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Trying to Agree on Three Articles of Law: The Idea/Expression Dichotomy in Chinese Copyright Law

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TRYING TO AGREE ON THREE ARTICLES
OF LAW: THE IDEA/EXPRESSION DICHOTOMY
IN CHINESE COPYRIGHT LAW*

STEPHEN MCINTYRE[†]

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* DISCLAIMER: The Editorial Board of CybarisTM relied on the author for the accuracy of the footnotes written in Chinese.

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[1:62:2010]

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I. INTRODUCTION

In 207 B.C.E., the peasant rebel Liu Bang led an attack on the capital city of Xianyang.¹ As the Qin Dynasty had been in tumult since the death of its first emperor three years earlier, the weakened King Ziying had little choice but to surrender.² Liu Bang, who would soon ascend to the throne as the first emperor of the Han Dynasty, announced that he would abolish the harsh and complex Qin penal code and seek a simpler alternative.³ According to legend, Liu repealed the Qin code and in its place promulgated only three articles of law: “First, murderers will be put to death; second, those who hurt others will be penalized; third, those who steal or rob will be punished.”⁴ Since then, the expression “agreeing on three articles of law”⁵ has become an idiom referring to the laying down of simple and clear rules.⁶

Unfortunately, modern copyright law does not lend itself to simplicity or clarity. While China has made significant legal advancements in recent decades, expanding, modernizing, and bringing coherency to its intellectual property (“IP”) laws, sizeable gray areas remain in the area of copyright. One such ambiguity pertains to the “fundamental principle . . . that a copyright does not protect an idea, but only the expression of the idea.”⁷ This doctrine, referred to as the “idea/expression dichotomy,” is not currently enshrined in the Copyright Law, China’s general copyright statute.⁸ The failure to codify such a basic doctrine would potentially be problematic in any modern copyright system, but it is particularly so in the context of China’s civil law system, which does not officially countenance doctrinal development through judicial precedent.⁹

¹ Burton Watson, *The Rise of Liu Bang, Founder of the Han*, in 1 SOURCES OF CHINESE TRADITION 232, 232 (William Theodore de Bary & Irene Bloom eds., 2d ed. 2000).

² JOHN W. HEAD & YANPING WANG, LAW CODES IN DYNASTIC CHINA: A SYNOPSIS OF CHINESE LEGAL HISTORY IN THE THIRTY CENTURIES FROM ZHOU TO QING 76 (2005).

³ Watson, *supra* note 1, at 233; LIU YONGPING, ORIGINS OF CHINESE LAW: PENAL AND ADMINISTRATIVE LAW IN ITS EARLY DEVELOPMENT 263–64 (1998).

⁴ SITU TAN, BEST CHINESE IDIOMS: VOLUME 2 158 (Tang Bowen trans., 10th ed. 1999).

⁵ 约法三章 (*yue fa san zhang*). *Id.*

⁶ *Id.*

⁷ Computer Assocs. Int’l v. Altai, Inc., 982 F.2d 693, 703 (2d Cir. 1992).

⁸ Xiao Jun, *Zhu zuo quan fa zhong sixiang yu biao da liang fen fa yuan ze han yi* [*The Meaning of the Idea/Expression Dichotomy in Copyright Law*], 21 JIANGSU JING GUAN XUE YUAN XUE BAO [J. JIANGSU POLICE OFFICER C.], No. 3, at 73, 73 (2006); Copyright Law (promulgated by the Standing Comm. of the Nat’l People’s Congress, Sept. 7, 2001, effective June 1, 1991, amended Oct. 27, 2001), translated at <http://www.chinaipr.gov.cn/laws/laws/copyright/232720.shtml> (P.R.C.) [hereinafter P.R.C. Copyright Law].

⁹ DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA IN A NUTSHELL 211–12 (2003). The Chinese judicial system is remarkably different from Western

The implications of this deficiency extend beyond the narrow realm of private copyright disputes, for the scope of copyright bears upon the contours of the public domain and the sphere of permissible speech. Recognition of copyright in ideas would shrink the public domain, restricting others' ability to respond to, retransmit, build upon, or otherwise make use of those ideas. On the other hand, an excessively rigid or narrow view of copyrightable expression may likewise discourage speech by reducing incentives to produce and disseminate original works.¹⁰ For these reasons, recognition (and, impliedly, the appropriate calibration) of the idea/expression dichotomy is a "constitutional requirement" in U.S. law.¹¹ Given China's lack of genuine speech protection,¹² these concerns become even more pressing in the Chinese context.

This Article argues that, lack of codification notwithstanding, the idea/expression dichotomy has gained widespread recognition among Chinese jurists. Over the past few decades, the doctrine has encountered cultural and linguistic obstacles, and has been the subject of significant conceptual disagreement among scholars and lawmakers. Far from clarifying the doctrine, China's statutory regime has only further obscured the distinction between ideas

models, especially those found in common-law countries. China's judicial system is comprised of the people's courts, which adjudicate cases; the people's procuratorates, which prosecute cases; and public security organs, which investigate illegal activity. *Id.* at 194. Although the Constitution of the People's Republic of China provides that the people's courts shall "exercise judicial power independently," XIAN FA art. 26, § 1 (1982) (P.R.C.), this independence is subject to both formal and informal restraints. The National People's Congress sits at the top of the hierarchy of governmental organs; the Supreme People's Court is responsible to the National People's Congress and its Standing Committee, and the people's courts are subordinate to the people's congresses at each level of government. CHOW, *supra*, at 195. Additionally, the president of the Supreme People's Court ranks lower than the premier of the State Council (the highest organ of state administration), reflecting the courts' inferior position relative to the State Council. *Id.* at 195–96. The courts at each level are also subject to Chinese Communist Party influence. *Id.* at 198–99. For a concise and superb overview of the Chinese judicial system, please *see id.* at 192–224.

¹⁰ *Cf.* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.").

¹¹ Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991).

¹² Although the Chinese Constitution bestows a right to free speech, XIAN FA art. 35, § 1 (1982) (P.R.C.), there is currently no mechanism for private enforcement of that right. *See* CHOW, *supra* note 9, at 111 (2003):

While China recognizes a number of human rights in theory in the Constitution, these rights are not recognized in practice because of an absence of implementing legislation. . . . [Because] the Constitution is not self-implementing and in the absence of legislation, PRC citizens find that they have no way to exercise their constitutional rights.

and protected expression. Yet, as this Article demonstrates, modern Chinese courts not only recognize the idea/expression dichotomy, but have managed to apply it in a reasonably coherent and defensible manner. Considerable problems and inconsistencies certainly persist, but the judiciary's relative success in "agreeing on three articles law" where the legislature has failed to do so suggests that Chinese courts, although formally limited in their authority to pronounce doctrine, nevertheless serve an essential lawmaking function.

Despite the foundational character of the idea/expression dichotomy, very little has been written in the English language about the doctrine under Chinese law. This Article attempts to fill this gap by exploring Chinese legal scholarship on the idea/expression dichotomy and by analyzing the doctrine's exposition and application in Chinese courts. The Article proceeds as follows: Part II provides a point of reference by describing the idea/expression dichotomy under U.S. law, and then summarizes the history of copyright in China. Part III discusses the development of the idea/expression dichotomy in Chinese law, highlighting the conceptual and statutory difficulties that the doctrine has encountered. Part IV then provides a survey of the doctrine's understanding and application "on the ground" in China by reference to a sampling of judicial opinions, with attention to both the successes and problem areas that these cases reveal. Part V concludes with an analysis of the Article's findings and a brief discussion of the broader questions these findings raise regarding the Chinese judicial system.

II. BACKGROUND

A. *The Idea/Expression Dichotomy*

The term "idea/expression dichotomy" refers to the principle that copyright protection extends only to "those aspects of [a] work — termed 'expression' — that display the stamp of the author's originality."¹³ Pursuant to this doctrine, which has been described as the "most fundamental axiom of copyright law,"¹⁴ the author of a work may not prevent others from appropriating the facts, ideas, concepts, and other non-expressive elements contained in his work, so long as his original expression is left untouched.¹⁵ The dichotomy therefore furthers the public-oriented objectives of copyright law¹⁶ by guaranteeing that authors and artists have sufficient commercial incentives to produce and disseminate creative

¹³ *Harper & Row*, 471 U.S. at 547.

¹⁴ *Feist*, 499 U.S. at 353.

¹⁵ *See id.* at 349–50 ("[c]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work." (citing *Harper & Row*, 471 U.S. at 556–57)).

¹⁶ *See* U.S. CONST. art. I, § 8, cl. 8 (purpose of intellectual property to "promote the Progress of Science and useful Arts").

works,¹⁷ while safeguarding the public's right to "build freely upon the ideas and information conveyed" in those works.¹⁸ As the primary demarcation between private rights and the public domain, the idea/expression dichotomy also serves to mediate the inherent tension between copyright and free speech.¹⁹

The Supreme Court's opinion in *Baker v. Selden*²⁰ provides one of the earliest articulations of the doctrine in American law.²¹ There, the plaintiff sued to enforce a copyright in a book that explained a particular system of book-keeping.²² The defendant had produced books that described "substantially the same system," but employed a different "form of arrangement."²³ The disposition of the case hinged on whether the plaintiff "had the exclusive right to the use of the system explained in his book," or whether "the system [was] open to public use."²⁴ The Court stated that recognition of a copyright in the book-keeping system would effect a "surprise and a fraud upon the public," for while the "description of the art" was entitled to copyright, the "art" itself was not.²⁵ Because the defendant did not copy the plaintiff's original expression, the Court held that he had not infringed the plaintiff's copyright.²⁶

¹⁷ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("[Copyright] is intended to motivate the creative activity of authors and inventors by the provision of a special reward . . .").

¹⁸ *Feist*, 499 U.S. at 350.

¹⁹ See Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1192 (1970) (concluding that the idea/expression dichotomy generally "represents an acceptable definitional balance as between copyright and free speech interests"); see also *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977) ("[T]he idea-expression dichotomy . . . serves to accommodate the competing interests of copyright and the first amendment.").

²⁰ 101 U.S. 99 (1879).

²¹ See Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's 'Total Concept and Feel'*, 38 EMORY L.J. 393, 400 (1989) ("The seminal case of *Baker v. Selden* was one of the first to employ the idea/expression dichotomy to deny a claim of copyright."). But see Jerome H. Reichman, *Computer Programs as Applied Scientific Know-How: Implications of Copyright Protection for Commercialized University Research*, 42 VAND. L. REV. 639, 693 n.288 (1989) (arguing that if *Baker v. Selden* simply stood for the idea/expression dichotomy, it "would have been superfluous at the time it was handed down, because the idea-expression doctrine dates back to the earliest origins of both domestic and foreign copyright law, and it was readily available to the Court if that was the point it had wanted to make.").

²² *Baker*, 101 U.S. at 99–100.

²³ *Id.* at 100–101.

²⁴ *Id.* at 100.

²⁵ *Id.* at 102, 105 (emphasis added).

²⁶ *Id.* at 107.

The most significant modern exposition of the doctrine came in *Feist Publications, Inc. v. Rural Telephone Service, Co.*²⁷ In considering the copyrightability of a telephone directory,²⁸ the Supreme Court clarified that copyright did not inhere in the “sweat of [an author’s] brow,” but rather in his original expression.²⁹ Thus, even though Rural Telephone had devoted a substantial amount of time, effort, and money to compiling the information in its directory, it was not entitled to an exclusive right in that information; under the idea/expression dichotomy, “a subsequent compiler remain[ed] free to use [those] facts” without Rural’s permission.³⁰ The Court further held that in order to qualify as original expression, a work must exhibit at least a “modicum of creativity.”³¹ Because the expressive elements of Rural’s directory — its selection, coordination, and arrangement of facts³² — did not even satisfy this low threshold, they did not constitute “expression” for the purposes of copyright, and could therefore be freely copied.³³

The idea/expression dichotomy is codified in Section 102(b) of the U.S. Copyright Act, which provides that copyright shall not “extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery.”³⁴ The doctrine has also been recognized, using similar language, in a number of international copyright treaties. Both the World Intellectual Property Organization Copyright Treaty (“WIPO Copyright Treaty”) and Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs Agreement”), for instance, state that “[c]opyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”³⁵

²⁷ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 342 (1991).

²⁸ *Id.* at 344.

²⁹ *See id.* at 359–60 (“[O]riginality, not ‘sweat of the brow,’ is the touchstone of copyright protection . . .”).

³⁰ *Id.* at 349.

³¹ *Id.* at 346.

³² *See id.* at 356–57 (selection, coordination and arrangement of a factual compilation may be copyrighted).

³³ *See id.* at 362.

³⁴ 17 U.S.C. § 102(b) (2006).

³⁵ World Intellectual Property Organization Copyright Treaty art. 2, Dec. 20, 1996, 112 Stat. 2860, 36 I.L.M. 65; Agreement on Trade-Related Aspects of Intellectual Property Law art. 9.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1125, 1201 (1994).

B. Copyright Law in China

Although the term “copyright” did not appear in China until the early twentieth century,³⁶ some have argued that the advent of Chinese printing technology — which preceded the Gutenberg press by several hundred years³⁷ — gave rise to a primitive copyright system.³⁸ The Tang Dynasty introduced what may be “the oldest publication ordinance in history” in the ninth century,³⁹ and beginning with the Song Dynasty in the tenth century, China’s Imperial Court exercised exclusive control over the printing of the Confucian Classics and certain other publications, producing official versions of the texts while forbidding private printers from reprinting unauthorized copies.⁴⁰ Scholars have also identified instances in which private publishers attached notices to works prohibiting their illicit reproduction.⁴¹ Historical records indicate that, occasionally, local officials enforced these notices by destroying infringing typefaces and punishing the offending parties.⁴² Some scholars, including Chinese copyright expert Zheng Chengsi, interpret these practices as evidence of an imperial copyright system.⁴³

This history certainly reveals a tradition of printing regulation in China, but whether it can rightly be termed a “copyright” regime is less certain. As Zheng himself concedes, a formal copyright law “has never been discovered,”⁴⁴ despite China’s rich legal history.⁴⁵ William P. Alford argues that Imperial China’s

³⁶ See ZHENG CHENGSI & MICHAEL PENDLETON, COPYRIGHT LAW IN CHINA 16 (1991).

³⁷ The earliest existing examples of Chinese wood block printing date to the eighth century. *See id.* at 11. Movable type printing also emerged in China at least 150 years before it did in the West (and possibly much earlier than that). *See id.* at 14–15.

³⁸ *See id.* at 11–12.

³⁹ See CHAN HOK-LAM, CONTROL OF PUBLISHING IN CHINA, PAST AND PRESENT 2 (1983) (decree issued in December 835 forbade “the private printing of almanacs by the local administrations”).

⁴⁰ See ZHENG CHENGSI & PENDLETON, *supra* note 36, at 12. Song publication laws “were aimed at protecting the state’s exclusive privileges in the compilation and dissemination of certain categories of works and literature.” CHAN HOK-LAM, *supra* note 39, at 4. The Imperial Court did apparently provide for a type of licensing system, under which private printers could reproduce some official works with authorization and for a fee. *See id.* at 19.

⁴¹ ZHENG CHENGSI & PENDLETON, *supra* note 36, at 16.

⁴² ZHENG CHENGSI, CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER LAW 86 (1987).

⁴³ *See id.* at 86–87.

⁴⁴ ZHENG CHENGSI & PENDLETON, *supra* note 36, at 16.

⁴⁵ Imperial China (especially the later dynasties) had an extensive written code, covering both criminal and civil matters. *See generally* WRITING AND LAW IN LATE IMPERIAL CHINA (Robert E. Hegel & Katherine Carlit eds., 2007); THE GREAT MING CODE/DA MING LÜ (Jiang Yonglin trans., Univ. of Wash. Press 2005); THE GREAT QING CODE (William C. Jones trans., Clarendon Press 1994).

extensive control over printed materials reflects concern over “the proliferation of undesirable printed materials” rather than recognition of private rights in literary property.⁴⁶ Printing regulation allowed the government “to define and supervise the realm of acceptable ideas,” a paternal responsibility that Confucian philosophy vested in the emperor.⁴⁷ The assertion that commercial printers may have affixed notices discouraging the reprinting of certain works, and that local officials may have occasionally been prevailed upon to punish piracy, is not conclusive evidence of an indigenous Chinese copyright system.⁴⁸ As Cynthia J. Brokaw writes, late Imperial China saw “only very tentative development of ideas of copyright,”⁴⁹ and “these concerns were never incorporated into the legal code.”⁵⁰

Regardless of whether Imperial China’s control over the printing industry may be considered a primitive copyright system, the notion of “copyright” in the Western sense did not officially enter the Chinese lexicon until the signing of a 1903 Sino-American treaty.⁵¹ While the treaty was rather thin in substance,⁵² in

⁴⁶ See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 13–15 (1995); see also CHAN HOK-LAM, *supra* note 39, at 2–3 (“[T]he Sung dynasty . . . promulgated elaborate laws and regulations governing the publication and distribution of literary works to uphold their prerogatives, purge unorthodox ideas and expressions, and stem the leak of information on state affairs and military defence to the northern enemy states.”).

⁴⁷ See ALFORD, *supra* note 46, at 24. Alford quotes Thomas Metzger as follows: “Lacking . . . John Stuart Mill’s optimistic view that good doctrines would emerge victorious out of a free marketplace of ideas, Chinese political philosophers since Mencius and Xunzi have instead emphasized the human tendency to become deluded through the interplay of ‘false’ and ‘correct’ doctrine.” *Id.* at 23 (THOMAS A. METZGER, *Foreword* to RICHARD W. WILSON ET AL., *MORAL BEHAVIOR IN CHINESE SOCIETY* xiv (1981)).

⁴⁸ See ALFORD, *supra* note 46, at 14:

There is some evidence of printers of the innocuous seeking the assistance of local officials to combat unauthorized use of their works and even of signs being posted to that effect—but these efforts appear scattered, ad hoc, and may well have been attributable to the fact that . . . private printers and local officials were often one and the same.

CHAN HOK-LAM, *supra* note 39, at 21–22 (efforts to protect rights of authors or publishers appear to be “only isolated cases of influential scholar-officials seeking to protect their own interests;” such instances “undercut by the lack of a sound legal framework and of formal procedures”).

⁴⁹ See Cynthia J. Brokaw, *On the History of the Book in China*, in *PRINTING AND BOOK CULTURE IN LATE IMPERIAL CHINA* 3, 7, 19 (Cynthia J. Brokaw & Kai-wing Chow eds., 2005).

⁵⁰ See *id.* at 19.

⁵¹ ZHENG CHENGSI & PENDLETON, *supra* note 36, at 16.

⁵² See NORWOOD F. ALLMAN, *PROTECTION OF TRADE-MARKS, PATENTS, COPYRIGHTS AND TRADE-NAMES IN CHINA* 103–12 (1924) (describing provisions of 1903 treaty). Notably, the treaty only applied to American works “especially prepared for the use and education of the Chinese people” and “translation[s] into Chinese of any book.” *Id.* at 103–04. The term lasted for

1910 (the final year of China's long imperial history), the Qing government managed to pass a true copyright statute⁵³ “contain[ing] substantive clauses similar to those to be found in the copyright laws of other countries.”⁵⁴ The 1910 statute remained in effect for only one year, but served as a model for subsequent copyright laws, which were promulgated in 1915 and again in 1928.⁵⁵ Nonetheless, due at least in part to the virtually constant conflict that plagued China during the first half of the twentieth century, none of these statutes were ever widely applied.⁵⁶

Although some preliminary copyright regulations were apparently drafted in the early years of the People's Republic of China (“PRC”),⁵⁷ it would be decades before another copyright statute was actually promulgated.⁵⁸ The PRC finally instituted copyright in the 1980s by means of the Trial Regulations on Copyright

a mere 10 years from the date of registration, and Chinese citizens had the right to make, print, and sell translations of American works without the permission of the author. *Id.*

⁵³ ZHENG CHENGSI & PENDLETON, *supra* note 36, at 16. A Chinese version of the 1910 statute is available at Da Qing zhu zuo quan lü [Copyright Act of the Great Qing Dynasty], <http://zh.wikisource.org/zh-hans/大清著作權律> (last visited Dec. 15, 2009). An English translation appears in ALLMAN, *supra* note 52, at 112–21. Although Allman indicates that the act was promulgated in 1912, one year after the Republic of China was established, *id.* at 121, I have found no evidence that any copyright law was promulgated in 1912, and have independently confirmed that the Allman translation in fact conforms to the 1910 law.

⁵⁴ ZHENG CHENGSI, *supra* note 42, at 87. The 1910 law applied to “literary works”; included a registration requirement; granted rights of reproduction, alteration, and attribution; bestowed a term of life plus thirty years; and enumerated several limitations, including a limited fair use clause. *See* ALLMAN, *supra* note 52, at 112–13, 117–18. However, the statute provided very little protection to foreign works. *See* ALFORD, *supra* note 46, at 42.

⁵⁵ ZHENG CHENGSI, *supra* note 42, at 87. The 1928 law, issued by the Nationalist government, provided substantial moral and economic rights protection to Chinese authors, but like the 1903 treaty and subsequent statutes, granted only thin protection to foreigners. *See* ALFORD, *supra* note 46, at 50 (describing provisions of 1928 statute).

⁵⁶ *See* ALFORD, *supra* note 46, at 53 (“Clearly, the disruption occasioned by the invasion of Manchuria in 1931, Chiang Kai-shek’s ongoing campaign to eradicate the Communists, further Japanese aggression, and the Chinese civil war that followed greatly impaired efforts to infuse life into the laws on intellectual property promulgated during the Nationalists’ first two decades.”).

⁵⁷ The PRC was established on October 1, 1949. Various documents concerning copyright were drafted in 1950s, including one entitled “Interim Regulations Concerning the Protection of Copyright in Published Works.” ZHENG CHENGSI, *supra* note 42, at 90. These documents were never implemented, however; Zheng suggests that this failure owes, at least in part, to the “series of political movements” beginning with the Great Leap Forward in the late 1950s and culminating in the Cultural Revolution. *See id.*

⁵⁸ During the early years of the PRC, authors’ rights were primarily governed by a set of standard contracts that regulated author–publisher relations. *See id.* at 88–90. This system dealt more with remuneration than copyright, and ultimately “succumbed when its pedestal, the individual person’s author status, was dismantled by the Cultural Revolution.” *See* PETER FENG, INTELLECTUAL PROPERTY IN CHINA 65 (2d ed. 2003).

Protection of Books and Periodicals (“Trial Regulations”), a classified document that guided judges in early cases.⁵⁹ China did not *publicly* recognize copyright until 1986, and even then said little more beyond providing that authors would receive protection in their works.⁶⁰ It was not until 1990 that the PRC promulgated a formal copyright statute — the first in six decades.⁶¹

While the 1990 Copyright Law substantially modernized China’s copyright system, its protections were “appreciably more curtailed . . . than suggested by its rhetoric and much of the initial commentary.”⁶² Since promulgating the Copyright Law, however, China’s governing and regulatory bodies have continually supplemented and clarified it through regulations, guidelines, and interpretations.⁶³ In 2001, the National People’s Congress amended the intellectual property laws in preparation for China’s accession into the World Trade Organization.⁶⁴ Additionally, in the last two decades China has signed on to the major international copyright agreements, including the Berne Convention, TRIPs Agreement, and WIPO Copyright Treaty.⁶⁵

The Copyright Law does not currently incorporate the idea/expression dichotomy.⁶⁶ To date, the doctrine has only been codified in the Computer Software Protection Regulations (“Software Regulations”), which were first issued in 1991 to address the special nature of software copyrights.⁶⁷

⁵⁹ See FENG, *supra* note 58, at 65–66.

⁶⁰ See ALFORD, *supra* note 46, at 77 (describing Article 94 of the General Principles of the Civil Law, the “PRC’s first major public recognition of copyright”); *cf.* General Principles of the Civil Law (promulgated by the Standing Comm. of the Nat’l People’s Cong., April 12, 1986, effective Jan. 1, 1987), art. 94, *translated at* <http://en.chinacourt.org/public/detail.php?id=2696> (recognizing copyright) (P.R.C.).

⁶¹ FENG, *supra* note 58, at 66.

⁶² ALFORD, *supra* note 46, at 78.

⁶³ XUE HONG & ZHENG CHENGSI, CHINESE INTELLECTUAL PROPERTY LAW IN THE 21ST CENTURY (2002) xxxv–xxxvii.

⁶⁴ *Id.* at xxxix.

⁶⁵ See *id.* at xxxix, 5 (describing China’s accession to Berne Convention, TRIPs Agreement); World Intellectual Property Organization, WCT Notification No. 66: Accession, Mar. 9, 2007, http://www.wipo.int/treaties/en/html.jsp?file=/redocs/notdocs/en/wct/treaty_wct_66.html (last visited Dec. 2, 2009) (announcing China’s accession to WIPO Copyright Treaty) (P.R.C.).

⁶⁶ See generally PRC Copyright Law.

⁶⁷ Regulations on Computer Software Regulation (promulgated by the State Council, June 4, 1991, effective Oct. 1, 1991) art. 7, *translated at* <http://www.asianlii.org/cn/legis/cen/laws/rftpocs542/> (P.R.C.); see also Fonda Y. Duvanel, *The Evolution and Enforcement of Computer Software Copyright in the People’s Republic of China*, 16 N.Y.L. SCH. J. INT’L & COMP. L 337, 344–47 (1996) (discussing rationale behind the Computer Software Protection Regulations).

Nonetheless, as demonstrated in Part IV, Chinese courts have applied the doctrine in other contexts with varying degrees of coherency since the early 1990s.⁶⁸

III. THE ELUSIVE IDEA/EXPRESSION DICHOTOMY IN CHINESE LAW

A. Existing Scholarship on the Idea/Expression Dichotomy in China

There is surprisingly little English-language scholarship on the idea/expression dichotomy in Chinese law. In *Intellectual Property in China*, for instance, Peter Feng acknowledges that Chinese courts have applied the doctrine, but devotes only a few paragraphs to the topic.⁶⁹ Similarly, Zheng Chengsi and Michael Pendleton merely allude to the dichotomy in *Copyright Law in China*,⁷⁰ and Peter Ganea and Thomas Pattloch only mention it in passing in their 2005 textbook.⁷¹ Surprisingly, Zheng Chengsi and Xue Hong do not address it at all in *Chinese Intellectual Property Law in the 21st Century*.⁷² While Jiarui Liu and Fang Fang have written a short English-language article addressing the idea/expression dichotomy in China, their exposition of it is limited to only a few cases⁷³ and is secondary to a larger argument about Internet copyright.⁷⁴ In

⁶⁸ See *infra* Part IV.

⁶⁹ See FENG, *supra* note 58, at 67–68, 76 (noting that although Chinese law did not codify the idea/expression dichotomy, courts could apply it on the basis of “jurisprudence,” i.e., the “general principles and doctrines that inform copyright systems in general”).

⁷⁰ See ZHENG CHENGSI & PENDLETON, *supra* note 36, at 67 (noting that some members of Copyright Law Drafting Committee interpreted certain U.S. copyright cases as “protect[ing] both ‘form’ and ‘content’ of a work, not merely form of expression”); *id.* at 83 (observing that exclusion of news reports from copyright protection “tends to blur” the “ideas/form of expression dichotomy”).

⁷¹ See PETER GANEA & THOMAS PATTLOCH, *INTELLECTUAL PROPERTY IN CHINA* 215 (Christopher Heath ed., 2005) (under reproducibility requirement of Chinese law, “[m]ere ideas which are not expressed by any means are excluded from protection”); *id.* at 228 (exclusion of calendars, numerical tables, formulas, etc., from copyright protection reflects the “general principle that information, ideas, operational modes, and so on are not copyright protected as such”).

⁷² See generally XUE HONG & ZHENG CHENGSI, *supra* note 63.

⁷³ Jiarui Liu & Fang Fang, *The Idea/Expression Dichotomy in Cyberspace: A Comparative Study of Web Page Copyrights in the United States and in China*, 25 EUR. INTEL. PROP. REV. 504, 507–09 (2003), available at http://works.bepress.com/jiarui_liu/2/.

⁷⁴ Jiarui Liu and Fang Fang spend much of their article explaining the significance of network effects, arguing: “Chinese copyright laws should define industrial standards as unprotectable ideas to facilitate their widespread imitation or adoption.” *Id.* at 509–14. While their exposition of the idea/expression dichotomy in Chinese law is limited, they do recognize that “copyright statutes [have] seemingly failed to give detailed and practical guidelines about the idea/expression dichotomy,” and maintain that further legislation is needed. *Id.* at 514.

general, existing scholarship contains little discussion of the contours of the doctrine in Chinese law or the manner in which it is applied in Chinese courts.⁷⁵

Based on the relative paucity of Western scholarship on the idea/expression dichotomy and the Copyright Law's apparent silence on the topic, it may be tempting to infer that the doctrine is not widely recognized in China. Yet according to Chinese scholar Chen Jiaqiang, the dichotomy has been "universally accepted" and is currently a "hot topic" in China.⁷⁶ Indeed, Chinese courts now routinely apply the doctrine,⁷⁷ and Chinese legal experts have published several articles on it in recent years.⁷⁸ These scholars recognize the dichotomy's fundamental significance in copyright law,⁷⁹ as well as its important policy functions. Feng Xiaoqing, for example, writes that the doctrine balances the public interest against authors' incentives, accommodates free speech, and protects the public domain.⁸⁰ Nonetheless, commentators also observe that the dichotomy is underdeveloped in Chinese law. As one scholar states, "even though it has been called a 'basic' principle," the idea/expression dichotomy is currently "awkward."⁸¹

⁷⁵ Jiarui Liu and Fang Fang's article is an exception to this general observation. Jiarui Liu and Fang Fang discuss a well-known case from the early 1990s, as well as two more recent cases involving Internet copyright. *Id.* at 507–09. Zheng Chengsi has also published summaries of two early cases applying the doctrine, ZHENG CHENGSI, INTELLECTUAL PROPERTY ENFORCEMENT IN CHINA: LEADING CASES AND COMMENTARY 17–42 (1997), which are discussed herein, *see infra* Part IV.A.

⁷⁶ Chen Jiaqiang, *Zhu zuo quan fa zhong si xiang yu biao da er fen fa yuan ze de jiedu yu chong gou* [An Interpretation and Reconstruction of the Idea/Expression Dichotomy in Copyright Law], 29 DALIAN DA XUE XUE BAO [J. DALIAN UNIV.], No. 2, at 107, 108 (2008).

⁷⁷ *See infra* Part IV.B.

⁷⁸ *See, e.g.,* Yang Tianhong & Ma Jing, *Qian yi si xiang yu biao da er fen fa* [Discussing the Idea/Expression Dichotomy], 2009 FA ZHI YU SHE HUI [LEGAL SYS. & SOC'Y], No. 16, at 306; Wang Yue & Xu Jianfei, *Ban quan fa si xiang, biao da er fen fa ji qi fa zhan—yi li yi ping heng wei fen xi gong ju* [The Idea/Expression Dichotomy in Copyright Law and its Development: Using Interest Balancing as an Analytical Tool], 24 NAN TONG DA XUE XUE BAO (SHE HUI KE XUE BAN) NAN TONG UNIV. J. (SOC. SCI. ED.), No. 3, at 100 (2008); Zhang Feifei, *Lun si xiang yu biao da er fen yuan ze de chan sheng* [On the Emergence of the Idea/Expression Dichotomy Principle], 2008 ZHONGGUO SHANG JIE [BUS. CHINA], No. 2, at 213; Li Yufeng, *Si xiang / biao da er fen fa de jian tao* [Reflections on the Idea/Expression Dichotomy], 8 BEI DA FA LÜ PING LUN [PEKING UNIV. L. REV.] 433, 433 (2007).

⁷⁹ *See* Xiao Jun, *supra* note 8, at 73 ("The idea/expression dichotomy has been called a basic principle of copyright law."); Chen Jiaqiang, *supra* note 76, at 107 (the idea/expression dichotomy "is seen as a self-evident principle of copyright law").

⁸⁰ Feng Xiaoqing, *Zhu zuo quan fa zhong si xiang yu biao da er fen fa yuan ze tan xi* [A Probe into the Idea/Expression Dichotomy Principle in Copyright Law], 33 HUNAN WEN LI XUE YUAN XUE BAO (SHE HUI KE XUE BAN) [J. HUNAN UNIV. ARTS & SCI. (SOC. SCI. ED.)], No. 1, at 71, 72, 75 (2008).

⁸¹ Xiao Jun, *supra* note 79, at 73.

The Chinese legal literature reveals that scholars have acknowledged the idea/expression dichotomy since the early 1980s, several years prior to the passage of the Copyright Law.⁸² Since that time, however, the doctrine's meaning has been a matter of almost constant debate and confusion. The next section, Part III.B, describes the translational difficulties, cultural factors, and major conceptual disagreements that have contributed to the dichotomy's elusiveness. Part III.C then addresses the Copyright Law's shortcomings, showing that it not only fails to provide authority for the idea/expression dichotomy, but in fact exacerbates the confusion surrounding it. As shall be discussed in Part IV, it is against this turbulent backdrop that Chinese courts have attempted to articulate and apply the dichotomy.

B. Disagreeing on Three Articles of Law: The Idea/Expression Dichotomy's Early Development in China

The Chinese legal community's failure to agree on the precise meaning of the idea/expression dichotomy over the past few decades may be due, in part, to translational problems.⁸³ For years Chinese legal scholars debated the proper translation for "copyright," to say nothing of the terminology required to express complicated and unfamiliar copyright doctrines.⁸⁴ Translating the

⁸² See, e.g., Yin Lantian & Chen Hong, *Jin kuai zhi ding shi he wo guo guo qing de ban quan fa: fang Zhongguo chu ban gong zuo zhe xie hui ban quan yan jiu xiao zu Shen Rengan tong zhi* [*Quickly Establish a Copyright Law Suitable to Chinese Conditions: An Interview with Comrade Shen Rengan of the Chinese Publishing Workers' Association Copyright Research Group*], 1983 FA XUE ZA ZHI [J. LEGAL STUD.], No. 3, at 35, 36 (stating that copyright does not protect "thoughts, content, [or] facts," but only the "form" in which thoughts, content, or facts are expressed). Legal scholarship on copyright was quite sparse in the first few years of the 1980's. Mark Sidel indicates that "[u]ntil 1982 no scholarly books or articles on copyright protection had appeared in the Chinese legal literature, and it was not until late 1983 that a detailed study publicly appeared" that recommended the establishment of a copyright statute. Mark Sidel, *The Legal Protection of Copyright and the Rights of Authors in the People's Republic of China, 1949–1984: Prelude to the Chinese Copyright Law*, 9 COLUM.-VLA J.L. & ARTS 477, 498 (1984–1985) (citing Huang Qinnan, *Lun bao hu zhu zuo quan* [*Protecting Copyright*], 1983 FA XUE YAN JIU [CHINESE J.L.], No. 2, at 47).

⁸³ Cf. Sun Peng, *Dui "Idea/Expression Dichotomy" de ren shi* [*Knowledge of the "Idea/Expression Dichotomy"*], 2008 HEILONGJIANG SHENG ZHENG FA GUAN LI GAN BU XUE YUAN XUE BAO [J. HEILONGJIANG ADMIN. CADRE INST. POL. & L.], No. 5, at 61, 61 (discussing ways in which "idea/expression dichotomy" has been translated in Chinese).

⁸⁴ See Zheng Chengsi, *Shi lun wo guo zhu zuo quan fa xiu ding de bi yao xing* [*On the Necessity of Amending China's Copyright Law*], 1994 ZHU ZUO QUAN [COPYRIGHT], No. 3, at 27, 27–28 (arguing that the Copyright Law ought to be amended so as to specify the relationship between the terms *banquan* and *zhuzuoquan*, both of which were in use as translations for "copyright"); Zhang Yongjiang, *Qian tan ban quan he zhu zuo quan* [*Discussing "Copyright" and "Copyright"*], 1988 FA LÜ SHI YONG [J.L. APPLICATION], No. 1, at 20, 20 (describing three

idea/expression dichotomy into Chinese is especially tricky, for the English terms “idea” and “expression,” as used in the copyright context, are both inherently ambiguous; “idea,” for instance, proxies for facts, processes, procedures, formulas, and other unprotectable subject matter. Which Chinese term best approximates this notion: *linian* (“idea”), *sixiang* (“thought”), *chuangyi* (“creativity”), *neirong* (“content”), or *gainian* (“concept”)? Tellingly, when Taiwan first attempted to codify the idea/expression dichotomy, it abandoned the effort out of frustration due to the difficulty of defining the relevant terms.⁸⁵

The idea/expression dichotomy may also clash with traditional Chinese culture, which to some extent equates the ideas expressed in a work with the expression itself. Confucianism not only tolerates copying, but considers it an “important living process” by which one learns from and retransmits another’s wisdom and knowledge.⁸⁶ Copying is a means of “tapp[ing] into [the] moral quality” of another’s artistic expression.⁸⁷ For this reason, “replication of particular concrete manifestations . . . by persons other than those who first gave them form” has historically been encouraged.⁸⁸ This conflation of a work’s expressive form with the wisdom that it communicates makes a Confucian analog to the idea/expression distinction rather unlikely, and may be partially to blame for the conceptual challenge that the doctrine has presented in China.⁸⁹

In addition to — and perhaps, to some extent, because of — translational difficulties and cultural particularities, the idea/expression dichotomy has been the subject of extensive theoretical disagreement in China. In the years leading up to

competing terms: *banquan*, *zuozhequan*, and *zhuzuoquan*); Mark Sidel, *supra* note 82, at 480–81 (describing “terminological weakness in the definition of copyright” in Chinese).

⁸⁵ Xiao Jun, *supra* note 8, at 73. When Taiwan eventually codified the doctrine, it enumerated the categories of unprotectable subject matter in a manner that closely tracks Section 102(b) of the U.S. Copyright Act. See *Zhu zuo quan fa* [Copyright Act] (promulgated by Nationalist Gov’t of Republic of China, May 14, 1928, amended May 13, 2009) art. 10bis (R.O.C.) (“Protection for copyright . . . shall not extend to the work’s underlying ideas, procedures, production processes, systems, methods of operation, concepts, principles, or discoveries.”), *translated at* <http://www.giprs.org/node/299>.

⁸⁶ Peter K. Yu, *Symposium: W(h)ither the Middleman: The Role and Future of Intermediaries in the Information Age: Of Monks, Medieval Scribes, and Middlemen*, 2006 MICH. ST. L. REV. 1, 28 (2006).

⁸⁷ Jonathan Ocko, *Copying, Culture, and Control: Chinese Intellectual Property Law in Historical Context*, 8 YALE J.L. & HUMAN. 559, 569 (1996) (book review).

⁸⁸ ALFORD, *supra* note 46, at 28 (quoting Wen Fong, *The Problem of Forgeries in Chinese Painting*, 25 ARTIBUS ASIAE 95, 100 (1962)).

⁸⁹ See Zhou Dafeng, *Zhongguo gu dai zhu zuo quan fa tan yuan* [The Origin of Ancient Chinese Copyright Law], 2009 SHANG YE WEN HUA (XUE SHU BAN) [BUS. CULTURE (ACADEMIC ED.)], No. 2, at 136, 136 (ancient Chinese notions of literature are “incompatible with the ‘idea/expression’ dichotomy in modern copyright systems”).

the passage of the Copyright Law, many scholars acknowledged the doctrine, stating for instance that “[c]opyright only protects a work’s ‘expressive form,’ and not the content, thoughts, ideas, or viewpoints reflected in a work.”⁹⁰ This view of copyright was not universal, however; legal experts advocated a wide range of theories as to where the line ought to be drawn between protected and unprotected subject matter.⁹¹ In the absence of governing law, Chinese courts and other adjudicative bodies likewise failed to achieve consensus; although litigation frequently presented questions as to the scope of copyright, one commentator observed that “[c]ourt decisions are inconsistent, and in fact are widely divergent.”⁹² Even after years of debate, the boundaries of copyright were still the focus of widespread disagreement in the late 1980s.⁹³

This indeterminacy came to a head in 1989 with a widely-publicized copyright dispute that directly implicated the idea/expression dichotomy. In authoring a dramatic work entitled *Number One Restaurant Under Heaven*, the defendant had drawn from a historical work on Quanjude, one of Beijing’s most famous restaurants.⁹⁴ He had borrowed facts and other information from the Quanjude book, but had purportedly copied only a small amount of text.⁹⁵ The plaintiff complained to the Beijing Copyright Bureau, which adjudicated the

⁹⁰ Nan Zhenhua, *Shi lun ban quan bao hu zhong de fu zhi, jia mao, piao qie he qiao he de ren ding* [Determining Copying, Counterfeiting, Plagiarism, and Coincidence in Copyright Protection], 1987 ZHENG ZHI YU FA LU [POL. & L.], No. 4, at 16, 18; see also Guo Dengke, *Zhu zuo quan ke ti de gou cheng yao jian* [The Composite Elements of the Object of Copyright], 1989 HEBEI FA XUE [HEBEI LEGAL STUD.], No. 6, at 27, 27 (copyright does not protect a “thought itself,” but only its “individual expressive form”).

⁹¹ See, e.g., Wei Zhi, *Xi ban quan dui zuo pin nei rong de bao hu* [Analyzing Copyright’s Protection of Works’ Content], 1989 FA XUE [LEGAL STUD.], No. 1, at 28, 29 (arguing that “copyright protects both a work’s form and its content,” but not “general” principles or facts); Zheng Chengsi, *Zuo zhe, zhu zuo wu yu ban quan* [Authors, Literary Works, and Copyright], 1989 ZHI SHI CHAN QUAN [INTELL. PROP.], No. 1, at 10, 11 (criticizing view that “copyright only protects a thought’s expressive form,” stating that “[t]he ‘form’ referred to . . . is not the work’s medium, but rather the work itself”); Fu Dingsheng, *Ban quan bao hu de shi zuo pin de biao xian xing shi: tan ban quan ke ti de zai ti xing* [Copyright Only Protects a Work’s Expressive Form: Discussing the ‘Medium-ness’ of the Object of Copyright], 1988 FA XUE [LEGAL STUD.], No.1., at 34, 35 (“Copyright protection does not contemplate a work’s content.”).

⁹² Fu Dingsheng, *supra* note 91, at 34.

⁹³ See Wei Zhi, *supra* note 91, at 28 (as of 1989, scope of copyright protection still the subject of extensive legislative, practical, and theoretical debate). Notably, Professor Wei predicted that questions as to the limits of copyright protection could be resolved through actual litigation, case-by-case. *Id.* at 29.

⁹⁴ Huang Weijun, “*Tian xia di yi lou*” *ban quan jiu fen suo yin qi de yu lun dui lei* [The Public Opinion Dispute That Number One Restaurant Under Heaven Triggered], 1989 ZHONGGUO XI JU [CHINESE DRAMA] 26, 26.

⁹⁵ Wu Haimin, “*Wo yao gao zhuang!*” [“I’m Going to Sue!”], http://vip.book.sina.com.cn/book/chapter_76116_50356.html (last visited Apr. 3, 2010).

dispute.⁹⁶ The controversy sparked extensive debate as to the scope of copyright — did copyright merely prohibit the reproduction of expression, or did it also preclude the borrowing of facts and other “content”?⁹⁷ Unfortunately, the Beijing Copyright Bureau’s decision did little to clarify the matter. Finding that the defendant had borrowed “a small portion of text and content,” the bureau ordered him to publish an explanation in a newspaper, acknowledging that he had taken “facts” from the Quanjude history book.⁹⁸

The controversy extended to the Copyright Law Drafting Committee as well. Zheng Chengsi, who served on the committee, indicates that many committee members were “disturbed” by the “total concept and feel” cases⁹⁹ in the United States.¹⁰⁰ They read these cases as extending protection to “both ‘form’ and ‘content’ of a work, not merely form of expression.”¹⁰¹ While the American cases may rightly be criticized,¹⁰² the drafters’ repulsion reflects both the terms in which the Quanjude debate was framed¹⁰³ and the rigid view of the idea/expression dichotomy that many Chinese scholars advocated: that copyright should only extend to a work’s “form” (*xingshi*), or expression in the most literal sense — “text, graphics, and other such external forms”¹⁰⁴ — and that the rest of

⁹⁶ *Id.*

⁹⁷ See Chang Lin, *Beijing ban quan jiu fen re tou shi* [Perspectives on Beijing Copyright Disputes], 1989 TI YU BO LAN [SPORTS VISION], No. 8, at 42, 42–43 (describing legal questions raised by the debate); *Zhu zuo quan fa xue li lun yan tao hui zong shu* [Summary of Copyright Legal Theory Conference], 1989 FA XUE JIA [JURISTS REV.], No. 6, at 28, 28 (summarizing various legal experts’ opinions on the dispute).

⁹⁸ Wu Haimin, *supra* note 95.

⁹⁹ See, e.g., *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977) (holding that defendants captured the “total concept and feel” of the plaintiffs’ television show (quoting *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970))).

¹⁰⁰ ZHENG CHENGSI & PENDLETON, *supra* note 36, at 68.

¹⁰¹ *Id.* Zheng Chengsi observes that “[c]ontent in some undefined way in various drafters’ minds was seen as different to [sic] ideas.”

¹⁰² See MELVILLE B. NIMMER & DAVID NIMMER, 4-13 NIMMER ON COPYRIGHT § 13.03[A][1][c] (Matthew Bender, Rev. Ed. 2009)

More broadly, the touchstone of ‘total concept and feel’ threatens to subvert the very essence of copyright, namely the protection of original *expression*. ‘Concepts’ are statutorily ineligible for copyright protection; for courts to advert to a work’s ‘total concept’ as the essence of its protectable character seems ill-advised in the extreme.

(emphasis original).

¹⁰³ See Chang Lin, *supra* note 97, at 43 (“The central question is whether copyright, in addition to a work’s expressive form, protects the work’s content.”).

¹⁰⁴ Chen Jiaqiang, *supra* note 76, at 108.

the work — its “content,” or *neirong* — should not be protected.¹⁰⁵ Despite the drafters’ apparent preference for this theory (and the obvious need for statutory guidance¹⁰⁶), the committee ultimately failed to codify this or any other version of the dichotomy. Nonetheless, by the early 1990s, this narrow “content/form” conceptualization of the doctrine had become quite popular.¹⁰⁷

There are obvious problems with this formulation. Most seriously, it contradicts other exclusive rights guaranteed under the Copyright Law. As Chen Jiaqiang points out, the content/form theory fails to explain the rights of translation and adaptation, which extend past the outward “form” of a work and protect some of its underlying “content” (such as plot).¹⁰⁸ Thus, as Zheng Chengsi argued in a forceful rebuttal of the theory in 1997, if “severe restrictions are not placed upon this principle,” it will “give a ‘green light’ to most infringing activities, save for verbatim copying, and copyright protection will ultimately come to nothing.”¹⁰⁹ In its place, Professor Zheng advocated a less rigid “thought/expression” (*sixiang/biaoda*) formulation.¹¹⁰ This view, which essentially mirrors the idea/expression dichotomy in U.S. law, was reportedly widely accepted in the Chinese legal world by the late 1990s.¹¹¹ However, the lasting influence of the content/form theory in Chinese copyright law is observable to this day, and the theory (albeit in a somewhat less rigid form) still enjoys some scholarly support.¹¹²

Thus, while the distinction between ideas and expression is inherently fuzzy — as Learned Hand said, no matter where the line is drawn, it will “seem

¹⁰⁵ *Id.*; see also *Zhu zuo quan fa xue li lun yan tao hui zong shu* [Summary of Copyright Legal Theory Conference], *supra* note 97, at 28 (quoting Professor Guo Shoukang as saying, “That copyright protects a work’s expressive form and not its ideological content is a principle of copyright law that embodies the legislative aims of copyright.”); Fu Dingsheng, *supra* note 91, at 34 (“The object of copyright is just the expressive form, and does not include the content expressed in a work”); Bai Xingcheng, *Ban quan zhi shi* [Copyright Knowledge], 1986 DANG AN [ARCHIVES], No. 5, at 41, 41 (“Copyright only protects a work’s form, and not a work’s content.”).

¹⁰⁶ In discussing the Quanjude dispute, one commentator wrote, “without a legal yardstick, it is extremely difficult to fairly resolve problems inherent to the social process of disseminating culture.” Chang Lin, *supra* note 97, at 43.

¹⁰⁷ Chen Jiaqiang, *supra* note 76, at 108.

¹⁰⁸ *Id.* Chen also notes that the content/form formulation does not account for the perceived expansion of copyright protection in U.S. cases. *Id.*

¹⁰⁹ ZHENG CHENGSI, BAN QUAN FA [Copyright Law] 41 (1997).

¹¹⁰ See *id.* at 41–48.

¹¹¹ Chen Jiaqiang, *supra* note 76, at 108.

¹¹² See *id.* at 108, 110 (describing a more liberal content/expressive form (*neirong/biaoda xingshi*) iteration, under which “form” would include not only such elements as text, but also structure, genre, and so forth; nonetheless, “form” would still be rather precisely and strictly defined, in contrast to the perceived open-endedness of the American approach to “expression”).

arbitrary”¹¹³ — the doctrine is particularly complicated in the Chinese context. In addition to (and arguably owing to) cultural and linguistic challenges, members of the Chinese legal community have had substantial difficulty agreeing upon the doctrine’s basic meaning. And as the following section demonstrates, the statutory regime has done little to mediate the uncertainty surrounding the dichotomy.

C. Searching (in Vain) for the Idea/Expression Dichotomy in Chinese Statutory Law

In explaining the idea/expression dichotomy, Chinese scholars tend to refer primarily to U.S. rather than Chinese law.¹¹⁴ While this might have to do with the fact that the doctrine is “most mature” in the U.S.,¹¹⁵ it may also be the case that *finding* the doctrine is simply more difficult in Chinese law. The Software Regulations provide, in language similar to the WIPO Copyright Treaty and TRIPs Agreement, that copyright “shall not extend to the ideas, processing, operating methods, mathematical concepts, or the like used in software development.”¹¹⁶ However, as previously noted, no similar provision has been promulgated with respect to other classes of copyrightable works.¹¹⁷

Nonetheless, Chinese legal experts have occasionally attempted to identify a basis for the idea/expression dichotomy within the four corners of generally applicable copyright law. While the Copyright Law provides no explicit statutory authority for the dichotomy, there are two provisions from which it may arguably be inferred: Article 5 of the Copyright Law, which exempts several categories of works from copyright coverage; and Article 2 of the Copyright Law Implementing Regulations (“Implementing Regulations”), which imposes a

¹¹³ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930).

¹¹⁴ *See, e.g.*, Chen Jiaqiang, *supra* note 76, at 107–08; Wang Yue & Xu Jianfei, *supra* note 78, at 101–102; Li Yufeng, *supra* note 78, at 435–39; Xiao Jun, *supra* note 8, at 75–76; Feng Xiaoqing, *Zhu zuo quan fa zhong si xiang yu biao da “er fen fa” de fa lü yu jing ji xue fen xi* [A Legal and Economic Analysis of the Idea/Expression Dichotomy in Copyright Law], YUNNAN DA XUE XUE BAO (FA XUE BAN) [J. YUNNAN UNIV. (L. ED.)], No. 1, at 28, 28–30 (2004).

¹¹⁵ Xiao Jun, *supra* note 8, at 73.

¹¹⁶ Regulation for Computer Software Protection (promulgated by the State Council, Dec. 20, 2001, effective Jan. 1, 2002) art. 6, available at http://www.sipo.gov.cn/sipo2008/zcfg/flfg/bq/fljxzf/200804/t20080403_369365.html, translated at <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/information-technology/regulation-for-computer-software-protection.html>; cf. World Intellectual Property Organization Copyright Treaty art. 2, Dec. 20, 1996, 112 Stat. 2860, 36 I.L.M. 65 (“Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”).

¹¹⁷ As Jiarui Liu and Fang Fang put it, China’s “copyright statutes [have] seemingly failed to give detailed and practical guidelines about the idea/expression dichotomy.” Jiarui Liu & Fang Fang, *supra* note 73, at 514.

“reproducibility” requirement on copyrighted works. A close examination of these provisions, however, reveals that neither affords a sound basis for the idea/expression distinction. If anything, the provisions only contribute to the doctrine’s ambiguity.

1. Copyright Law, Article 5

Article 5 of the Copyright Law exempts several classes of works from copyright protection, including the following: “(2) news on current affairs; and (3) calendars, numerical tables and forms of general use, and formulas.”¹¹⁸ Subsection (2) is interpreted narrowly to cover only works consisting of “purely factual information”¹¹⁹ or “pure news” — works that merely communicate information and do not include the author’s opinions, analysis, or other “creative labour.”¹²⁰ Likewise, the works enumerated in subsection (3) are seen as belonging to the realm of “common knowledge.”¹²¹ Because these two provisions primarily concern noncreative, factual works, some commentators have claimed that they reflect the “general principle that information, ideas, operational modes, and so on are not copyright protected as such.”¹²²

Inferring an idea/expression distinction from Article 5, however, is problematic. As Zheng Chengsi (who advocated that Article 5 be included in the statute)¹²³ concedes, the news exemption “tends to blur,” rather than elucidate, the dichotomy.¹²⁴ While reported facts are no doubt uncopyrightable, even “purely factual” articles possess literary and other expressive qualities that would, in the absence of the categorical exemption, merit protection. Strangely, under the exemption, an author obtains copyright in a news-based work through the inclusion of opinion, reflection, or analysis — *ideas*, rather than original expression.¹²⁵ Similarly, many of the categories of works in subsection (3) may potentially exhibit original creative expression and, were it not for the exemption, qualify for copyright protection.¹²⁶ Hence, these exemptions are more likely

¹¹⁸ PRC Copyright Law arts. 5(2)–(3).

¹¹⁹ GANEA & PATTLOCH, *supra* note 71, at 228.

¹²⁰ ZHENG CHENGSI, *supra* note 75, at 37.

¹²¹ FENG, *supra* note 58, at 84.

¹²² GANEA & PATTLOCH, *supra* note 71, at 228; *see also* Jiarui Liu & Fang Fang, *supra* note 73, at 507 (asserting that Article 5 of the Copyright Law, “if properly interpreted, to a sizeable extent overlaps with [Section 102(b)] of the US Copyright Act of 1976”).

¹²³ ZHENG CHENGSI, *supra* note 75, at 39.

¹²⁴ ZHENG CHENGSI & PENDLETON, *supra* note 36, at 83.

¹²⁵ *See* FENG, *supra* note 58, at 85 (“A news report attracts copyright if the reporter registers *comments or reflections*.” (emphasis added)).

¹²⁶ Just like telephone directories, calendars, tables, and forms are informational or factual works. While such works may normally only be eligible for a “thin” copyright, there is room for original expression in their presentation, as well as in their selection, arrangement, and

indicative of policy (i.e., that certain classes of works should not receive protection *per se*)¹²⁷ than a doctrinal distinction between facts or ideas and expression.

That Article 5 obscures the distinction between ideas and expression is evident from a recent news-related copyright dispute. In 2008, the government-run China News Service (“CNS”) sued a private website, hc360.com, for retransmitting thousands of CNS news articles without authorization.¹²⁸ Hc360.com defended its actions on the basis of the news reporting exception.¹²⁹ CNS responded by arguing that many of the news articles were entitled to copyright, not because they exhibited original expression, but because they “included the *opinions* of CNS editorial staff.”¹³⁰ While hc360 impliedly appropriated the *expression* of those opinions as well, CNS’s imprecise legal argument both reflects and perpetuates Article 5’s failure to distinguish ideas from original expression. As this demonstrates, the provision serves more to obscure the doctrine than to support it.

2. Copyright Law Implementing Regulations, Article 2

Scholars and (less frequently) judges have similarly attempted to infer the idea/expression distinction from Article 2 of the Implementing Regulations, which provides that works must be “capable of being reproduced in a certain tangible form” in order to qualify for copyright.¹³¹ In a 2008 decision, for

coordination of facts. *See* Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 356–57 (1992).

¹²⁷ A structural argument supports this reading as well. The two exemptions just discussed are juxtaposed with subsection (1) of Article 5, which exempts government documents “of a legislative, administrative or judicial nature” from copyright. PRC Copyright Law art. 5(1). As these documents are neither “purely factual” nor “common knowledge,” the idea/expression dichotomy cannot easily be inferred from this exemption, which appears side-by-side with the exemptions in subsections (2) and (3). *Id.* at (2), (3).

¹²⁸ China News Service Sues E-Commerce Site, <http://www.chinaipr.gov.cn/cases/copyright/237304.shtml> (last visited Apr. 4, 2009).

¹²⁹ *Id.*

¹³⁰ *Id.* (emphasis added); *see also* Zhang Ming, *Zhongguo xin wen wang xiang “na lai zhu yi” shuo bu* [China News Service Says “No” to Free Riding], REN MIN RI BAO [PEOPLE’S DAILY], Apr. 14, 2008, available at <http://health.chinanews.cn/it/hlwxw/news/2008/04-14/1219455.shtml> (CNS claimed that the articles “were not pure news, but were topical articles that also included the reporters’ and editors’ *views* and other *information*” (emphasis added)).

¹³¹ Implementing Regulations of the Copyright Law (promulgated by the State Council, Aug. 2, 2002, effective Sept. 15, 2002) art. 2, translated at <http://www.chinaipr.gov.cn/laws/laws/copyright/232725.shtml> [hereinafter Implementing Regulations]. In contrast to the Implementing Regulations, U.S. copyright law requires that copyrighted works be “fixed in [a] tangible medium of expression.” 17 U.S.C. § 102(a) (2006). “Since the [PRC Copyright Law] does not require a work to be fixed in tangible form, works expressed in non-tangible means, for

example, the Sichuan High People's Court stated that it was "evident" from Article 2 that copyright protects "the manner of expressing ideas and emotions, and not the concepts themselves."¹³² Zheng Chengsi struck a similar chord in his rebuttal to the concept/form theory, arguing that because thoughts and theories "lack reproducibility" they cannot possibly be infringed (or even protected).¹³³ In other words, if an idea has not yet been committed to some expressive form (written, spoken, or otherwise) it is not "capable of being reproduced in a certain tangible form," and therefore must fall outside of the scope of copyright.

The problem with this approach is that even after a fact or idea has been committed to some expressive form from which it can be reproduced, that form may nonetheless fail to merit copyright protection. An example would be the phone directory in *Feist*; although the facts had been arranged in the directory, and therefore were "capable of being reproduced in a certain tangible form," the directory nonetheless did not enjoy copyright protection because it did not exhibit sufficient creativity.¹³⁴ As is discussed at greater length below, Chinese courts have reached the same conclusion in similar cases,¹³⁵ effectively barring noncreative — but nonetheless reproducible — works from copyright protection. Because reproducibility constitutes a necessary, but insufficient, prerequisite for copyright protection, Article 2 is at best an imperfect source for the idea/expression dichotomy.

In sum, the law on the books neither articulates, nor provides a sound basis for inferring, the idea/expression dichotomy in contexts other than computer software.¹³⁶ In a civil law system that lacks *stare decisis*, the absence of a

example by stage performance, are generally protectable provided they can be reproduced in a tangible form." GANEA & PATTLOCH, *supra* note 71, at 215.

¹³² Zhang Chengxuan v. Zhang Jixiang (Sichuan High People's Ct., Mar. 28, 2008), *available at* http://ipr.chinacourt.org/public/detail_sfws.php?id=24238.

¹³³ ZHENG CHENGSI, *supra* note 109, at 48.

¹³⁴ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362–63 (1991).

¹³⁵ *See, e.g.,* Guo Kun v. Huang Zhenqiao (Jiangsu High People's Ct., Nov. 18, 2008), *available at* http://ipr.chinacourt.org/public/detail_sfws.php?id=25392 (simply listing 12 ingredients used to make medicinal soup according to their names did not constitute original expression); *see also infra* Part IV.B.4.

¹³⁶ One might argue that, in the absence of statutory guidance, Chinese courts may directly apply the idea/expression dichotomy as codified in an international treaty to which China is a party, such as the WIPO Copyright Treaty or TRIPs Agreement. There is some disagreement as to whether treaties are self-executing in China. *See* Randall Peerenboom, *The Evolving Regulatory Framework of Enforcement of Arbitral Awards in the People's Republic of China*, 1 ASIAN-PAC. L. & POL'Y J. 12, 15 (2000) (claiming that "[t]reaties are self-executing in China"). *But see* Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 907 (2006) ("[I]nternational treaties in China are far from self-executing"). Article 142 of the General Principles of the Civil Law provides that the terms of a

statutory source for such a foundational principle represents a significant shortcoming, and has almost certainly contributed to the Chinese legal community's confusion and disagreement over the doctrine's proper scope and application. The drafters' failure to "agree on three articles of law" thus presents a real predicament for the courts, which are tasked with determining the scope of copyright in actual cases.¹³⁷

IV. THE IDEA/EXPRESSION DICHOTOMY ON THE GROUND IN CHINESE COURTS

Although the Copyright Law does not expressly provide for the idea/expression dichotomy, modern Chinese courts nonetheless apply it fairly routinely.¹³⁸ Peter Feng explains that in the 1980s, when copyright was still governed by the provisional and incomplete terms of the Trial Regulations, Chinese courts began applying principles drawn from the "jurisprudence" (*fali*), meaning "the general principles and doctrines that inform copyright systems in general."¹³⁹ Feng writes that the courts' reliance on the jurisprudence "enabled copyright to be justified on principles far beyond the limited [Trial Regulations]

treaty may only be applied in the event of conflict with domestic law. However, "[w]hether treaties are ever in practice self-executing in China is questionable. Despite the language of the General Principles of Civil Law, there are few examples of China enforcing the provisions of an international treaty absent domestic legislation." Benjamin L. Liebman, *Autonomy Through Separation?: Environmental Law and the Basic Law of Hong Kong*, 39 HARV. INT'L L.J. 231, 277 n. 214 (1998). At the very least, Chinese courts seem resistant to directly applying international treaties. For instance, in a widely-publicized 2008 trade dress decision, the Supreme People's Court chided a lower court for directly applying the Paris Convention, and instead construed PRC law so as to properly resolve the dispute. *Meng Te Sha Foods Ltd. v. Ferrero S.p.A.* (Sup. People's Ct., Mar. 24, 2008), available at http://ipr.chinacourt.org/public/detail_sfws.php?id=16266. Thus, it seems more likely that a Chinese court would infer the idea/expression dichotomy from Chinese law—especially since the Copyright Law does not actually *contradict* the doctrine—rather than apply a treaty directly.

¹³⁷ Formally, the lower courts are quite limited in their authority to interpret law. See CHOW, *supra* note 9, at 169 ("In China, courts do not play such a central role in the legal system and, with the notable exception of the Supreme People's Court, have only a limited role in the interpretation of laws."). But the task of applying law to fact necessarily involves some degree of interpretation. This is evident from published case decisions in China, which are "increasingly similar to the 'findings of fact and conclusions of law' published by federal district courts in the United States." Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 ASIAN-PAC. L. & POL'Y J. 255, 303 (2003).

¹³⁸ That this is the case may be gleaned from a survey of reported court decisions posted at the Supreme People's Court's Intellectual Property Division's website. See Zhongguo zhi shi chan quan cai pan wen shu wang [China Intellectual Property Judgment Net], <http://ipr.chinacourt.org/> (last visited Dec. 3, 2009). The cases discussed in this article are intended to illustrate trends in modern judicial decision-making relative to the idea/expression dichotomy, but do not constitute a comprehensive body of idea/expression case law.

¹³⁹ FENG, *supra* note 58, at 67.

provisions.”¹⁴⁰ The idea/expression dichotomy is one of the general copyright doctrines that Chinese courts have imported from outside China’s statutory copyright regime.¹⁴¹ Because judges have borne the primary responsibility for expounding the doctrine’s meaning and scope in China, despite formal limitations on their lawmaking authority,¹⁴² the idea/expression dichotomy essentially constitutes a judge-made doctrine of Chinese copyright law.¹⁴³

While early cases articulating the dichotomy left much to be desired, modern decisions evince an increasingly coherent and sophisticated view of it. The following section describes two well-known cases from the 1990s that acknowledge the doctrine, but which fail to provide a satisfactory explanation of it. The subsequent section then demonstrates, through a detailed analysis of recent case law, that modern courts have developed a much firmer (but still imperfect) grasp of the idea/expression distinction. This finding supports the view that Chinese courts are more competent and active in developing substantive law than is generally appreciated.

A. *The Murky Early Cases*

In light of the conceptual uncertainty and statutory defects described in Part III, it should come as no surprise that the early idea/expression decisions are not beacons of clarity. The case most frequently cited¹⁴⁴ as proof of China’s early recognition of the doctrine is *Li Shuxian v. Jia Yinghua*,¹⁴⁵ which was decided shortly after the Copyright Law took effect. Li Shuxian, the widow of China’s last emperor, Pu Yi, arranged with Jia Yinghua to publish a book about the emperor.¹⁴⁶ Another man, Wang Qingxiang, then managed to persuade Li to collaborate with him rather than Jia; their book was published in 1987.¹⁴⁷ Jia nevertheless continued his own research, traveling around China to collect information and speak with Pu Yi’s family members and associates.¹⁴⁸ When Jia published his book, Li and Wang sued him for copyright infringement.¹⁴⁹ Jia denied having copied their book, claiming that his was his own independent

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 67–68.

¹⁴² *See supra* notes 9, 137 and accompanying text.

¹⁴³ Indeed, in applying the idea/expression dichotomy, Chinese judges rarely attempt to find a statutory hook for it. They typically state the doctrine as a self-evident principle of copyright law.

¹⁴⁴ *See, e.g.,* ZHENG CHENGSI, *supra* note 75, at 19–20; CHENG RONGBIN & JIANG XIAOCHUAN, ZHI SHI CHAN QUAN: AN LI, FA GUI, SHI TI [INTELLECTUAL PROPERTY: CASES, REGULATIONS, AND QUESTIONS] 47–48 (2006); Jiarui Liu & Fang Fang, *supra* note 73, at 507–08.

¹⁴⁵ ZHENG CHENGSI, *supra* note 75, at 17.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 17–18.

¹⁴⁸ *Id.* at 18.

¹⁴⁹ *Id.*

creation and that the coincidence of historical facts in the two works was inevitable.¹⁵⁰

The court ruled in Jia's favor, holding that the repetition of historical facts alone does not give rise to infringement.¹⁵¹ Commentators therefore interpret *Li Shuxian* as authority for the principle that, consistent with the idea/expression dichotomy, facts are not copyrightable.¹⁵² While the court did impliedly recognize the dichotomy, it shed little light on its contours. The court's brief decision suggests partiality to the content/form formulation: whereas the court described historical facts as "content," it held that Jia had exhibited originality in his "expressive form."¹⁵³ Indeed, the case has been praised for its apparent refusal to recognize copyright in nonliteral expression.¹⁵⁴ Yet the court also listed "creative style" as a component of "form,"¹⁵⁵ which seemingly conflicts with a strict, literalist view of the doctrine. Given this ambiguity, *Li Shuxian*'s significance is limited to its acknowledgment, rather than explanation, of the idea/expression dichotomy.

While idea/expression case law from the 1990s is sparse, it appears that the doctrine (predictably) remained hazy after *Li Shuxian*. This is evident from *Guangxi Broadcasting & TV Newspaper v. Guangxi Coal Workers Newspaper*,¹⁵⁶ a 1995 decision that has cryptically been described as "similar to . . . the *Feist* case . . . but with a contrary decision."¹⁵⁷ *Guangxi Broadcasting* centered on the copyrightability of charts displaying weekly television programming, which the defendant had republished without seeking the plaintiff's permission.¹⁵⁸ Both the trial court and Liuzhou intermediate court agreed that the charts were not

¹⁵⁰ *Id.* at 18–19.

¹⁵¹ *Id.* at 19; see also CHENG RONGBIN & JIANG XIAOCHUAN, *supra* note 144, at 46 (describing court's reasoning in *Li Shuxian v. Jia Yinghua*).

¹⁵² See, e.g., ZHENG CHENGSI, *supra* note 75, at 19–20; CHENG RONGBIN & JIANG XIAOCHUAN, *supra* note 144, at 46; Jiarui Liu & Fang Fang, *supra* note 73, at 507–08.

¹⁵³ CHENG RONGBIN & JIANG XIAOCHUAN, *supra* note 144, at 46.

¹⁵⁴ See Zhang Youyi, *You guan mo dai huang di jiu fen kai zhu zuo quan shen pan xian he 20 nian chen ai luo ding* [After 20 Years, The Dust Has Settled in the "Last Emperor" Dispute that First Initiated Judicial Precedent in Copyright], LEGAL DAILY, July 1, 2007, http://news.xinhuanet.com/legal/2007-07/01/content_6314108.htm (contrasting *Li Shuxian v. Jia Yinghua* with *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222 (3d Cir. 1986), in which the court "erroneously found copyright infringement on the basis of similarities in structure, sequence, and organization").

¹⁵⁵ CHENG RONGBIN & JIANG XIAOCHUAN, *supra* note 144, at 46.

¹⁵⁶ ZHENG CHENGSI, *supra* note 75, at 34.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 34–35.

copyrightable,¹⁵⁹ but the Liuzhou court nonetheless awarded compensation and issued an injunction on the rationale that allowing free republication of the charts would not be “fair.”¹⁶⁰ Notwithstanding the television charts’ lack of copyrightable expression, the court believed that equitable principles favored the plaintiff.

The Liuzhou court may not have technically contravened the idea/expression dichotomy, but it effectually undermined a major policy rationale for the doctrine: protection of the public domain. Denying the charts’ copyrightability but prohibiting their reproduction on “fairness” grounds effectually amounts to the creation of an exclusive right in facts. *Guangxi Broadcasting’s* significance for copyright law is further undermined by the fact that, when the Supreme People’s Court (“SPC”) republished the Liuzhou court’s decision, it omitted the copyright holding.¹⁶¹ The “official” version of the opinion states that the charts did not fall within the Article 5(2) “news reporting” exception (an argument the defendant had advanced), but ultimately leaves the charts’ copyright status ambiguous.¹⁶² The SPC-approved version also jettisons the “fairness” rationale, grounding the outcome of the case instead in an earlier administrative notice that did not relate to copyright.¹⁶³

As *Li Shuxian* and *Guangxi Broadcasting* demonstrate, Chinese courts apparently recognized the idea/expression dichotomy in the 1990s, but did not elaborate its precise meaning and may not have thoroughly appreciated the purposes of the doctrine.

¹⁵⁹ By comparing the case to *Feist*, Zheng Chengsi implies that the courts both denied copyrightability for lack of originality; however, he does not elaborate on either court’s rationale. See ZHENG CHENGSI, *supra* note 75, at 35–36. Peter Feng does not address the lower court’s rationale, but states that the intermediate court “declined to view the chart as copyright [sic] for lack of originality.” FENG, *supra* note 58, at 86. The version of the opinion that was eventually published—as amended by the Supreme People’s Court’s Adjudication Committee—indicates that the lower court held that the charts fell within the Article 5(2) “news reporting” exception. *Guangxi Broad. & TV Newspaper v. Guangxi Coal Workers Newspaper* (as amended), CHINALAWINFO, (last visited Apr. 3, 2010).

¹⁶⁰ ZHENG CHENGSI, *supra* note 75, at 36.

¹⁶¹ Since 1985, the Supreme People’s Court has republished selected lower court decisions in the *Gazette of the Supreme People’s Court of the People’s Republic of China*. However, the Court frequently edits the selected cases prior to publication in the *Gazette*. Nanping Liu, “*Legal Precedents with Chinese Characteristics: Published Cases in the Gazette of the Supreme People’s Court*,” 5 J. CHINESE L. 107, 108, 116 (1991).

¹⁶² *Guangxi Broadcasting* (as amended).

¹⁶³ *Id.*

B. Contemporary Application of the Idea/Expression Dichotomy

In recent years, China has invested heavily in its court system, especially with respect to the handling of intellectual property cases. Since the early 1990s, an increasing number of courts have set up “IPR chambers” staffed by “younger and better-trained judges whose careers are devoted to adjudicating [IP] cases.”¹⁶⁴ As a consequence, judicial decision-making has greatly improved in these courts.¹⁶⁵ While the Chinese judiciary is considered weak by Western standards,¹⁶⁶ the SPC has become more assertive, issuing detailed interpretations of existing law in a quasi-legislative manner.¹⁶⁷ The Court has also long republished “typical” (*dianxing*) judicial opinions, which guide lower courts, clarify points of doctrine, and serve a quasi-precedential function.¹⁶⁸ In November 2008, the SPC promulgated 100 “typical” IP cases, which are expected to bring greater coherence and predictability to Chinese IP law.¹⁶⁹ Additionally, new IP-related judicial opinions are routinely posted to the SPC Intellectual Property Division’s website.¹⁷⁰

If the courts’ modern understanding of the idea/expression dichotomy is any indication, China’s investment in its legal and judicial system has borne fruit. Despite the doctrine’s tortured history in China, modern courts have managed to apply it in a reasonably coherent manner. While there are some residual problem

¹⁶⁴ FENG, *supra* note 58, at 28. Earlier this year, for instance, the People’s Court in the Changping District of Beijing established an IPR trial chamber. *IPR in China, Beijing: Changping Court Sets Up IPR Trial Chamber*, May 25, 2009, available at <http://www.chinaipr.gov.cn/news/local/261441.shtml>.

¹⁶⁵ Yu, *supra* note 136, at 946–47.

¹⁶⁶ One scholar has wondered (rather cynically) whether, “despite [Chinese courts’] superficial resemblance to the courts of Western nations, they can be regarded as functionally comparable institutions.” Anthony R. Dicks, *Compartmentalized Law and Judicial Restraint: An Inductive View of Some Jurisdictional Barriers to Reform*, 141 *CHINA Q.* 82, 94–95 (1995); see also CHOW, *supra* note 9 (describing Chinese judicial system).

¹⁶⁷ Zhang Lihong, *The Latest Developments in the Codification of Chinese Civil Law*, 83 *TUL. L. REV.* 999, 1006 (2009). Of course, the rulemaking nature of these interpretations raises serious constitutional questions. See *id.* (describing SPC interpretations as a “deformed exercise of legislative power—a power not granted to such a judicial body under China’s constitutional law”). Nonetheless, even in the face of criticism from some lawmakers and scholars, the SPC continues to issue judicial interpretations. *Id.*

¹⁶⁸ FENG, *supra* note 58, at 34. Lower courts may not, however, cite directly to previous cases. *Id.*

¹⁶⁹ Yun Zhang, *China IP: 100 Typical Cases Provide More Certainty for Right Holders*, *ASIAN LEGAL BUSINESS*, Dec. 16, 2008, available at <http://asia.legalbusinessonline.com/contents/31930/details.aspx>.

¹⁷⁰ Zhongguo zhi shi chan quan cai pan wen shu wang [China Intellectual Property Judgment Net], <http://ipr.chinacourt.org/> (last visited Apr. 3, 2010).

areas, Chinese judges have gone a long way toward compensating for the deficiencies in PRC statutory law.

1. Chinese Courts' Basic Conception of the Idea/Expression Dichotomy

Chinese courts typically explain the idea/expression dichotomy in terms similar to Zheng Chengsi's American-styled thought/expression (*sixiang/biaoda*) formulation. For instance, as one court recently stated, "copyright does not protect the 'thoughts' [*sixiang*] that an author expresses in his work, but only the author's 'expression' [*biaoda*]." ¹⁷¹ Other terms are occasionally used in conjunction with or, less frequently, in the place of *sixiang*, including *guannian* ("concepts"), *qinggan* ("emotions"), and *chuangyi* ("creativity"). Similarly, some courts have enumerated the various uncopyrightable elements in a manner similar to the TRIPs Agreement or the U.S. Copyright Act. ¹⁷² In fact, in one instance, a court has lifted its explication of the doctrine directly from Section 102(b) of the U.S. statute, albeit without citation. ¹⁷³ This variance in terminology is not so much indicative of a lack of consensus as it is an appreciation of the breadth of unprotectable elements encapsulated in the shorthand "idea."

Wan Juan v. Changsha Flagship Real Estate Consulting is fairly representative of Chinese courts' application the idea/expression dichotomy. That case concerned the copyrightability of a work on real estate investment that the plaintiff had authored. ¹⁷⁴ The court held that because the plaintiff had "supplemented" uncopyrightable computation tables with her own textual narration, she was entitled to copyright protection. ¹⁷⁵ Although the defendants had allegedly appropriated some of the plaintiff's ideas, their copying did not extend to the plaintiff's original expression. Because "the scope of copyright protection does not extend to . . . concepts as such, the plaintiff [could] not prevent others from using the ideas expressed in her work." ¹⁷⁶ As in *Baker v. Selden*, the plaintiff could only claim copyright in her original expression, but not in the ideas themselves.

¹⁷¹ Tian Xiuhua v. Anhui Lin Shui Wine Co. (Anhui High People's Ct., Dec. 23, 2008), available at http://ipr.chinacourt.org/public/detail_sfws.php?id=30786.

¹⁷² See, e.g., Zhang Chengxuan v. Zhang Jixiang (Sichuan High People's Ct., Mar. 28, 2008), available at http://ipr.chinacourt.org/public/detail_sfws.php?id=24238 ("'[C]oncepts' [*sixiang guannian*] refers to opinions, ideas, principles, objective facts, creativity, inventions and discoveries, crafts and methods, etc.").

¹⁷³ Wan Juan v. Changsha Flagship Real Estate Consulting Ltd. (Changsha Intern. People's Ct., Dec. 7, 2005), available at http://ipr.chinacourt.org/public/detail_sfws.php?id=2977.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

In addition to applying the idea/expression dichotomy as such, Chinese courts have also recognized a number of related doctrines. For instance, the *Wan Juan* court rebuffed the plaintiff's claim that the defendants had copied her expression of certain mathematical concepts by invoking the merger doctrine.¹⁷⁷ And in *Liu Kai v. Da'erhan Maoming'an United People's Government*, an intermediate court recognized the concept of "thin" copyright, holding that a map, as a factual work with limited expressive possibilities, could only be infringed by verbatim copying.¹⁷⁸ Finally, in a SPC-approved "typical" case, the Chongqing High People's Court conducted an analysis resembling the abstraction–filtration–

¹⁷⁷ *See id.*:

[B]ecause mathematical formulas may only be expressed in one manner, they merge with the ideas that the work is intended to express Objectively speaking, others are unable to find an alternate expressive form that adequately reflects those ideas. Therefore, the plaintiff cannot prohibit the defendant from copying [the expression of] her mathematical formulas in order to make use of the real estate investment method [that they express].

Cf. 4-13 NIMMER & NIMMER, *supra* note 102, at §13.03[B][3] ("In some circumstances . . . there is a 'merger' of idea and expression, such that a given idea is inseparably tied to a particular expression. In such instances, rigorously protecting the expression would confer a monopoly over the idea itself, in contravention of the statutory command.").

¹⁷⁸ *See Liu Kai v. Da'erhan Maoming'an United People's Gov't* (Inner Mongolia Baotou Interm. People's Ct., July 31, 2007), *available at* http://ipr.chinacourt.org/public/detail_sfws.php?id=21476:

[b]ecause maps are "scientific works" that normally "reflect objective truths," there is little "room for creativity" and the "manner of expression is limited to one or only a few possible forms. Anyone who draws a map [of the same region] cannot avoid identity or similarity [T]he map should not receive copyright protection, except in the case of verbatim copying of the copyright holder's original work.

Cf. *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1439 (9th Cir. 1994) ("When the range of protectable and unauthorized expression is narrow, the appropriate standard for illicit copying is virtual identity.").

comparison test,¹⁷⁹ in which it “filtered” out facts and other unprotected elements in assessing substantial similarity.¹⁸⁰

2. *The Residual Appeal of Content/Form*

Although Chinese courts shy away from the strict content/form (*neirong/xingshi*) formulation, some courts have nonetheless tended to view expression in overly literalist terms. For instance, in *He Xiaoli v. Dao Lang*, the Shaanxi High People’s Court stated that the Copyright Law “primarily protects a work’s expressive form [*biaoda xingshi*], but does not protect the thoughts and emotions expressed by a work.”¹⁸¹ That case concerned two songs that bore the same name and allegedly had similar lyrics. The court rejected the plaintiff’s argument that the songs should be analyzed for similarity as to “theme” or “plot,” and instead simply determined how many words the defendant had borrowed.¹⁸² Because the songs were textually distinct, the court held that no infringement had occurred.¹⁸³ While theme is likely too abstract to merit protection, categorically excluding plot as part of the author’s expression is difficult to reconcile with the rights of translation and adaptation.¹⁸⁴

In *Guangzhou Xian Yi Body Undergarment Co. v. Guangzhou Jin Ke Trade Co.*, the Guangzhou Baiyun District People’s Court took a slightly more liberal, but still restricted, approach to expression.¹⁸⁵ There, the plaintiff charged that the

¹⁷⁹ See *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 706 (2d Cir. 1992):

In ascertaining substantial similarity . . . a court would first break down the allegedly infringed program into its constituent structural parts. Then, by examining each of these parts for such things as incorporated ideas, expression that is necessarily incidental to those ideas, and elements that are taken from the public domain, a court would then be able to sift out all non-protectable material. Left with a kernel, or possibly kernels, of creative expression after following this process of elimination, the court’s last step would be to compare this material with the structure of an allegedly infringing program.

¹⁸⁰ See *Gao Xiaohua v. Chongqing Chen Kezhi Culture & Arts Broad. Co.* (Chongqing High People’s Ct., June 29, 2006), available at http://ipr.chinacourt.org/public/detail_sfws.php?id=4951 (declining to find infringement on the basis of shared geographical and topographical features in two paintings, stating that the plaintiff “may not transfer [elements] that belong in the public domain into his work’s realm of exclusive protection”).

¹⁸¹ *He Xiaoli v. Dao Lang* (Shaanxi High People’s Ct., Aug. 31, 2005), available at http://ipr.chinacourt.org/public/detail_sfws.php?id=1690.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ PRC Copyright Law arts. 10(14), (15); cf. Chen Jiaqiang, *supra* note 76, at 108 and accompanying text.

¹⁸⁵ *Guangzhou Xian Yi Body Undergarment Co. v. Guangzhou Jin Ke Trade Co.* (Guangzhou Baiyun Dist. People’s Ct., July 26, 2007), available at http://ipr.chinacourt.org/public/detail_sfws.php?id=17911.

defendant had infringed its commercial advertisement. The court found infringement on the ground that the defendant's and plaintiff's commercials were substantially similar as to "main content, basic plot, narration, product demonstrations, etc."¹⁸⁶ Yet despite this apparent recognition of copyright in nonliteral expression (in "basic plot," for instance), the court went on to state that the plaintiff's "cinematographic techniques" did *not* constitute "expressive form," and therefore were not entitled to copyright protection.¹⁸⁷ This holding seems strange in light of the obvious analogies that may be drawn between a filmmaker's use of a camera and an artist's use of a brush (which another court has recognized as a component of the artist's expression¹⁸⁸).

As these cases demonstrate, there is some residual hesitancy among some courts to extend copyright protection to works' nonliteral expression. Courts do not embrace the strict content/form version of the dichotomy, but even a more liberal iteration of the theory (such as that applied in *Guangzhou Xian Yi*) risks unduly circumscribing copyright.

3. "Sweat of the Brow" Considerations

Chinese courts have largely eschewed the "sweat of the brow" doctrine in copyright disputes. In *Wan Juan*, for example, the plaintiff claimed copyright in some of the concepts presented in her work on real estate investment, on the basis that she herself had pioneered them.¹⁸⁹ The Changsha Intermediate People's Court responded by stating "the plaintiff cannot, on this basis, forbid others from using the ideas expressed in her work."¹⁹⁰ Similarly, in *Beijing Jiu Qi Software Limited Stock Co. v. Shanghai Tian Chen Computer Software Co.*, the Shanghai Second Intermediate People's Court held that although the plaintiffs had "expended a certain degree of labor" in designing a user interface for their

¹⁸⁶ *Id.* While "etcetera" would seem very out of place in a U.S. legal text, the Chinese equivalent, *deng*, is quite common in Chinese law—to the consternation of Westerners. As Deborah Cao writes, "[t]he habitual and sometimes over-frequent use of *deng* . . . allows for open-ended interpretations[, which] can cause a great deal of uncertainty and ambiguity." DEBORAH CAO, CHINESE LAW: A LANGUAGE PERSPECTIVE 102 (2004).

¹⁸⁷ *Id.*

¹⁸⁸ *Gao Xiaohua v. Chongqing Chen Kezhi Culture & Arts Broad. Co.* (Chongqing High People's Ct., June 29, 2006), available at http://ipr.chinacourt.org/public/detail_sfws.php?id=4951 (like the Baiyun court in *Guangzhou Xian Yi*, this court uses the term *shoufa* for "technique.").

¹⁸⁹ See *Wan Juan v. Changsha Flagship Real Estate Consulting Ltd.* (Changsha Interm. People's Ct., Dec. 7, 2005), available at http://ipr.chinacourt.org/public/detail_sfws.php?id=2977 ("In this case, the plaintiff emphasizes that she originated 'actual down payment' and other concepts, and that the defendant, without authorization . . . used these concepts, and that this constitutes copyright infringement.").

¹⁹⁰ *Id.*

software; they were not entitled to a copyright in that feature because it did not exhibit sufficient original expression.¹⁹¹

However, there is evidence that the equitable “fairness” principle invoked in *Guangxi Broadcasting* still has some vitality. In *Pan Ling v. Ma Liqing*, the defendant had copied some material from plaintiff’s unpublished doctoral dissertation.¹⁹² The Beijing Haidian District People’s Court held that the material in question was not copyrightable, but nonetheless ordered the defendant to compensate the plaintiff on the ground that free riding off of the plaintiff’s efforts was not “fair.”¹⁹³ Although the Beijing Second Intermediate People’s Court vacated the trial court’s decision, siding with the plaintiff on different grounds,¹⁹⁴ the lower court’s decision reveals that “sweat of the brow” considerations — under the guise of equitable “fairness” — at least occasionally, hold sway in Chinese courts. This effectually creates a proprietary interest in facts, ideas, and other uncopyrighted subject matter, thereby undermining the public-oriented policies that the idea/expression dichotomy serves.

4. Originality and Creativity

Like the U.S. Supreme Court in *Feist v. Rural*, Chinese courts have recognized the necessary interplay between the idea/expression dichotomy and the statutory requirement that copyrighted works exhibit “originality.”¹⁹⁵ As the Anhui High People’s Court has asserted, “copyright law . . . only protects the author’s ‘expression,’ . . . [which] means that the work *possesses originality* and is reproducible in a certain tangible form.”¹⁹⁶ Consistent with *Feist*, Chinese courts have distinguished originality from novelty, and have inferred that originality requires some degree of creativity.¹⁹⁷ In *Beijing Jiu Qi*, for example, the court held that the computer program’s user interface was not copyrightable because its menus and buttons merely “indicated their respective functions,” and

¹⁹¹ Beijing Jiu Qi Software Ltd. Stock Co. v. Shanghai Tian Chen Computer Software Co. (Shanghai 2d Interm. People’s Ct., Jan. 25, 2005), *available at* http://ipr.chinacourt.org/public/detail_sfws.php?id=9254.

¹⁹² Pan Ling v. Ma Liqing (Beijing 1st Interm. People’s Ct., June 8, 2009), *available at* <http://hi.baidu.com/%B6%DB%B5%B6sd/blog/item/6b375d104b1407cfa6ef3f95.html>.

¹⁹³ *Id.*

¹⁹⁴ *See id.* (holding that the borrowed materials were in fact copyrighted, and that the defendant had infringed them).

¹⁹⁵ *See* Implementing Regulations art. 2 (copyrighted works must be original).

¹⁹⁶ Tian Xiuhua v. Anhui Lin Shui Wine Co. (Anhui High People’s Ct., Dec. 23, 2008), *available at* http://ipr.chinacourt.org/public/detail_sfws.php?id=30786 (emphasis added).

¹⁹⁷ *See id.* (“The originality requirement under copyright law . . . does not require that the thought expressed in or form employed by a work be novel, only that the work be independently completed and reflect certain personalized features. . . .”).

its overall layout was “only a simple permutation.”¹⁹⁸ Like the plaintiff’s directory in *Feist*, the user interface was so lacking in creativity that it “failed to meet the originality requirement.”¹⁹⁹

There is a serious lack of consensus, however, as to the standard for creativity. As one scholar observes, “theorists have constantly debated the originality requirement’s definitional standard as adopted in Chinese law.”²⁰⁰ One view that has gained some traction draws from the German concept of *Schöpfungshöhe*, which requires that authors exhibit a “level of creativity” that “rise[s] above craftsmanship, above the average.”²⁰¹ This standard is somewhat more demanding than the “modicum of creativity” rule set forth in *Feist*.²⁰² A handful of Chinese courts have endorsed and applied this heightened standard.²⁰³ In *Ai Lu Mu International Stock Co. v. Huizhou Xin Li Da Electronic Instrument Co.*, for example, the Guangdong High People’s Court denied copyright in a work of applied art because its artistic elements did not exhibit “artistic meaning or

¹⁹⁸ Beijing Jiu Qi Software Ltd. Stock Co. v. Shanghai Tian Chen Computer Software Co. (Shanghai 2d Interm. People’s Ct., Jan. 25, 2005), available at http://ipr.chinacourt.org/public/detail_sfws.php?id=9254.

¹⁹⁹ *Id.*

²⁰⁰ Ye Qing, *Lun zuo pin de du chuang xing biao zhun* [On the Originality Standard], 2007 FA ZHI YU SHE HUI [LEGAL SYS. & SOC’Y], No. 2, at 694, 695.

²⁰¹ Gerhard Schricker, *Farewell to the “Level of Creativity” (Schöpfungshöhe) in German Copyright Law?*, 26 INT’L REV. INDUS. PROP. & COPYRIGHT L. 41, 41–42 (1995).

²⁰² See Guy Pessach, *The Legacy of Feist Revisited—A Critical Analysis of the Creativity Requirement*, 36 ISR. L. REV. 19, 22, 35 (2002) (advocating continental Europe’s “personal intellectual creation” standard, which is codified in German copyright law, requires a “high level of creativity”); see also Schricker, *supra* note 201, at 41–42 (stating the “level of creativity” concept is “one of the terms employed . . . to clarify the cryptic formula of a ‘personal intellectual creation,’ contained in Sec. 2(2) of the German Copyright Act”).

²⁰³ See, e.g., Wuhan Garden Sculpture Ctr. v. Tu Ya (Henan High People’s Ct., Aug. 29, 2007), available at http://ipr.chinacourt.org/public/detail_sfws.php?id=18099 (affirming trial court, which considered the “level of creativity” that the plaintiff “invested” in his work in reaching its conclusion); Guangzhou Xian Yi Body Undergarment Co. v. Guangzhou Jin Ke Trade Co. (Guangzhou Baiyun Dist. People’s Ct., July 26, 2007), available at http://ipr.chinacourt.org/public/detail_sfws.php?id=17911 (“[T]he work must reflect the author’s personalized or individualized level of creativity”); Zhang Liusheng v. Anhui Prov. Susong County Post Off. (Anhui High People’s Ct., June 8, 2004), available at http://ipr.chinacourt.org/public/detail_sfws.php?id=2995 (“Not all photographs can become photographic works [protected under the Copyright Law]; only those photographs that achieve a certain level of creativity and possess originality merit copyright protection.”). Additionally, some of the early scholarship on the Copyright Law endorsed the “level of creativity” standard. See, e.g., Xiao Jun, *Lun wo guo zhu zuo quan fa bao hu de zuo pin* [On Works Protected by China’s Copyright Law], 1990 ZHONGGUO FA XUE [CHINESE LEGAL STUD.], No. 6, at 60, 63.

aesthetic value,” and therefore failed to achieve the “level of artistic creativity” necessary to constitute a copyrightable artistic work.²⁰⁴

The “level of creativity” standard is not universally applied, however; several other iterations of the creativity requirement exist. Some cases have stated that originality requires that a work display “certain personalized features.”²⁰⁵ In another court’s view, “originality refers to . . . distinctiveness [*teyixing*] or difference [*chayixing*] that distinguishes [the work] from other works.”²⁰⁶ In a case designated as “typical” by the Supreme People’s Court, the Yunnan High People’s Court stated that a copyrighted work must “be capable of independently expressing comments, knowledge, ideas, thoughts, emotions, etc., such that a large audience may understand a certain message.”²⁰⁷ In that case, the court determined that the *title* of the work in question was not itself copyrightable because the author’s “thoughts, emotions, personality, and creative style” could not be deduced from it.²⁰⁸

While the imposition of a creativity requirement is necessary to preclude overbroad copyright protection in works that are independently authored and reproducible, but minimally expressive, the substance of that requirement is not yet clear in Chinese law. The Supreme People’s Court recently expressed some preference for the Yunnan court’s formulation, but the standard has yet to gain widespread acceptance among Chinese judges and scholars.

In sum, modern Chinese courts generally recognize and apply the idea/expression dichotomy in a defensible manner. The courts have imported associated doctrines (such as merger), recognized the dichotomy’s relationship with originality, and inferred a creativity requirement. However, the cases also reveal a tendency to view “expression” in unduly literalist terms, occasional appeals to sweat-of-the-brow considerations, and a high degree of indeterminacy with respect to the creativity requirement.

²⁰⁴ *i* Lu Mu Int’l Stock Co. v. Huizhou Xin Li Da Elec. Instrument Co. (Guangdong High People’s Ct., Oct. 20, 2006), available at http://ipr.chinacourt.org/public/detail_sfws.php?id=8613.

²⁰⁵ Tian Xiuhua v. Anhui Lin Shui Wine Co. (Anhui High People’s Ct., Dec. 23, 2008), available at http://ipr.chinacourt.org/public/detail_sfws.php?id=30786; see also *Guangzhou Xian Yi* (“[T]he work must reflect the author’s personalized or individualized level of creativity.”).

²⁰⁶ Guo Kun v. Huang Zhenqiao (Jiangsu High People’s Court, Nov. 18, 2008), available at http://ipr.chinacourt.org/public/detail_sfws.php?id=25392.

²⁰⁷ Zhao Jikang v. Qujing Cigarette Factory (Yunnan High People’s Ct., Sept. 26, 2003), available at http://ipr.chinacourt.org/public/detail_sfws.php?id=5517.

²⁰⁸ *Id.*

V. CONCLUSION

In light of the West's manifest anxiety over China's copyright regime,²⁰⁹ the relative lack of scholarship on the idea/expression dichotomy under Chinese law is surprising. In addition to the economic factors that justify Western concern for Chinese copyright law generally,²¹⁰ there are social and political reasons to study the idea/expression dichotomy specifically. As a vital speech protection, the doctrine takes on special significance in China, a nation with a poor record on speech issues. All copyright laws restrict speech to one degree or another²¹¹ and some academics have noted the censorial potential of China's Copyright Law in particular.²¹² Without a recognition that ideas, facts, and similar elements are not subject to copyright, the Chinese public would be even more inhibited in its freedom to exchange information and ideas.²¹³

As the Copyright Law does not presently articulate the idea/expression dichotomy, one might expect that Chinese courts would fail to appreciate this fundamental distinction, overextending copyright and shrinking the public domain. But as this Article shows, the courts widely acknowledge the doctrine and apply it routinely — notwithstanding the lack of statutory authority for it. The status and content of the doctrine have been subjects of considerable

²⁰⁹ For an excellent account of the West's influence on Chinese intellectual property law see generally, ANDREW C. MERTHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* (2005). A recent example of Western anxiety over Chinese copyright law is a WTO dispute initiated in 2007, in which the United States alleged that various provisions in Chinese law conflicted with the country's obligations under the TRIPs Agreement. In January 2009, a WTO panel released a report indicating that China's laws did, in fact, conflict with the agreement in some respects. *W.T.O. Finds China Copyright Law Lacking*, N.Y. TIMES, Jan. 27, 2009, at B11, available at <http://www.nytimes.com/2009/01/27/business/27trade.html>.

²¹⁰ The Motion Picture Association, for instance, estimates that inadequate copyright enforcement in China costs Hollywood studios hundreds of millions of dollars annually. Clifford Coonan, *Studios Retool Anti-Piracy Tactics*, VARIETY, Nov. 29, 2007, <http://www.variety.com/article/VR1117976756.html>.

²¹¹ See, e.g., Nimmer, *supra* note 19, at 1181 (asserting that the U.S. Copyright Act literally “abridges the ‘freedom of speech’ and ‘of the press’ in that it punishes expressions by speech and press when such expressions consist of the unauthorized use of material protected by copyright”); Yochai Benkler, *Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 363 (1999) (stating copyright law creates “expectation[s] about how government will behave” toward certain communications).

²¹² See, e.g., GANEA & PATLOCH, *supra* note 71, at 226 (showing content-based restrictions in Copyright Law “understandable against the background of a government that still claims the authority to decide what people may read, watch and hear”); ALFORD, *supra* note 46, at 79 (stating provisions of the 1990 Copyright Law “echo[ed] historic efforts to use copyright as a means of limiting the spread of heterodox ideas”).

²¹³ See Nimmer, *supra* note 19, at 1189 (arguing if copyright protected ideas, “[t]he market place of ideas would be utterly bereft, and the democratic dialogue largely stifled”).

confusion in China, but on the basis of the courts' increasingly sophisticated case opinions, it appears that the judiciary has managed to safeguard the public domain by filling much of the gap left by the legislature. In this respect, the Chinese idea/expression dichotomy promotes freedom of expression.

This is not to say, however, that the courts' exposition of the doctrine is entirely consistent with the purposes of copyright. For instance, the courts tend to under appreciate copyright interests by taking an overly literalist approach to "expression." In addition to creating tension with the various derivative work rights bestowed by the Copyright Law, this trend threatens to discourage speech by undermining incentives to produce and publish new creative works, and may also contribute to China's notorious under protection of copyright.²¹⁴ A heightened creativity standard, which erects an additional barrier to copyright protection and arguably requires courts to judge aesthetic value, presents the same dangers. And while non-copyright doctrines, such as equitable "fairness," may to some extent mitigate the threat of diminished incentives, they distort the theory and purposes of copyright law by countenancing "sweat of the brow" considerations and recognizing *de facto* proprietary interests in uncopyrightable subject matter.

These complications highlight the need for further development in Chinese copyright law. While the National People's Congress or State Council would do well to codify the idea/expression dichotomy in the Copyright Law or Implementing Regulations, perhaps using a broad formulation similar to that found in the WIPO Copyright Treaty and TRIPs Agreement, it will probably continue to devolve upon the courts to flesh out the doctrine. The Supreme People's Court can effectively coordinate this effort through the issuance of official interpretations of the Copyright Law and the designation of "typical" cases that demonstrate application of the dichotomy in specific factual circumstances. These quasi-legislative, quasi-jurisprudential mechanisms are likely to promote uniformity among the courts while allowing for flexibility and frequent fine-tuning. Hopefully the Chinese judiciary keeps in mind the public-oriented purposes of the idea/expression dichotomy as it continues to elucidate the doctrine.

The relative success of Chinese courts in developing the idea/expression dichotomy raises compelling questions about the Chinese judicial system

²¹⁴ As one scholar concluded in 2006, China's "enforcement of intellectual property laws may well be described as unsatisfactory if not dismal or in crisis." JIANQIANG NIE, THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN CHINA 217 (2006). Like underenforcement of copyright law, unduly circumscribing the scope of copyrightable expression undermines the ability of authors and artists to protect their legitimate interests.

generally. Do Chinese courts, despite the many limitations on their authority,²¹⁵ perform a lawmaking role comparable to that seen in the courts of common-law systems? While this Article's findings suggest that this may be the case, a study of judicial decision-making across a broader range of contexts will be necessary to corroborate this phenomenon. To the extent that Chinese courts may be said to "make law," additional questions loom as to the judiciary's evolving role under the PRC Constitution and in Chinese society, as well as the factors that animate Chinese judicial reasoning when the legal code is ambiguous. Each of these avenues for future research promises to shed additional light on the capacity of Chinese courts to "agree on three articles of law."

²¹⁵ See CHOW, *supra* note 9, at 169, 195–96 and accompanying text; *see also* supporting text, *supra* note 137.